BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARTHA BURNS	)	
Claimant	)	
	)	
VS.	)	
	)	
KANSAS AVIATION OF INDEPENDENCE	)	
Respondent	)	Docket No. 1,045,683
	)	
AND	)	
	)	
TOKIO MARINE & NICHIDO FIRE INSURANCE COMPANY, LIM	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the September 21, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein (ALJ).

ISSUES

The ALJ found the claimant to have suffered a personal injury by accident while in the employment of respondent and that timely notice of the injury was given. Medical treatment was authorized and respondent and its carrier were ordered to designate a list of physicians from which claimant could select one to treat her neck complaints.

The respondent requests review of this decision alleging the ALJ erred in concluding that claimant met her evidentiary burden of showing that she sustained a personal injury by accident arising out of and in the course of her employment. Simply put, respondent maintains the greater weight of the credible evidence shows that claimant sustained injury to her neck in an accident over a weekend while recreating with her grandchildren, and not as a result of any sort of repetitive work activities. Respondent also contests the ALJ's finding that claimant provided timely notice of her claim as required by K.S.A. 44-520.

Claimant argues the ALJ's Order should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges she sustained a repetitive trauma culminating in an injury on April 5, 2009. She further alleges she is in need of medical treatment for her ongoing complaints of neck pain and headaches. There is no dispute that she is in need of treatment to her neck. However, the cause of her ongoing complaints is contested.

Claimant asserts that her job as a supervisor/team leader for respondent requires her to work in a stress-filled environment that is fast paced, output driven and involves repetitive work activities, including writing, manipulating wires and connectors and carrying and testing equipment. On Friday, April 3, 2009, claimant completed her work day without incident. She had lunch with Cheryl Burdett, a co-worker, that same day and voiced no complaints about her physical condition.

Over that weekend, claimant spent time with her grandchildren, walking behind a 4-wheeler that was being used to pull her grandchildren who were on skates. Claimant denies any sort of acute injury during this activity or at any time during this weekend. Sometime on that Saturday and into Sunday, claimant began experiencing severe pain in her left arm along with blotching over the surface of the skin on her left arm. She sought treatment from a local emergency room on April 5, 2009. The ER records give this history:

> The patient is a 49 years old Female who presents with a complaint of left arm pain and left arm swelling. Duration lasting 24 hour(s). The course is constant and increasing. Location: Left upper arm. Type of injury: swelling tenderness. The degree of pain is moderate. The degree of swelling is minimal. Degree of dysfunction: negative. The exacerbating factor is negative. The mitigating factor is heat. There are risk factors including trauma and repetitive stress.[1]

Claimant was diagnosed with a contusion of the upper extremity. She returned to that same ER on April 5, 2009 with the same complaints, including an additional reference to pain when she turned her head, and asked to be rechecked. She was seen but referred to her primary care physician.

Claimant followed up with Dr. Robert Osborn and he referred her for an MRI. On April 29, 2009, she saw Dr. Osborn and according to claimant, he advised her that her condition was work-related. He also referred her to a neurosurgeon, Dr. John R. Smithson, who recommended that she undergo surgery for a herniated disc at C5-6.

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[1] P.H. Trans., Resp. Ex. 4 at 7 (physicians note at 2).

Claimant immediately reported this to her employer and asked to make a workers compensation claim.[2] This is the first date that respondent believes it was notified of a work-related injury. A formal claim followed shortly thereafter and claimant was referred to a physician for an evaluation.

On May 5, 2009, claimant was seen by Gary Raleigh, a registered nurse practitioner that works with Dr. John J. Koehler in Bartlesville, OK. Mr. Raleigh took a history from claimant, reviewed her records, and concluded "[t]his event is not work-related, and the patient needs to follow-up with her primary care physician under her own private insurance to get her situation corrected that way."[3] He reasoned that there was no "sentinel event that identifies this as being a possible work-related event. There is no true injury to the patient's neck. There are no complaints of any acute onset of injury, and there is no identification of a certain time frame or identification of an action that caused an acute onset of the pain."[4] Dr. Koehler ratified these findings in a separate letter to respondent's counsel.[5]

Claimant was also seen by Dr. Pedro Murati on July 1, 2009 at the request of her attorney. Dr. Murati indicated claimant was suffering from radiculopathy which is "a direct result from the work-related injury that occurred on 09-01-08 & EWDT during her employment with Kansas Aviation."[6] His report contains no reference to the blotching on the skin that was present in April 2009. Nor is there any mention of walking behind the 4-wheeler and accompanying her grandchildren while they skated.

When treatment was not voluntarily provided, claimant sought a preliminary hearing. Respondent denied liability on a number of grounds. First, it denied that claimant suffered any injury while in respondent's employ. Rather, respondent contended that to the extent she was injured, the injury occurred over the weekend while claimant was entertaining her grandchildren. In support of this contention, respondent offered the testimony of Ms. Burdett who testified that claimant mentioned to her about possibly being hurt while walking with her grandchildren who were skating. Second, respondent asserted that claimant job is not repetitive and therefore, she cannot credibly assert any repetitive injury claim. Third, she failed to timely provide notice of her injury as required by K.S.A. 44-520.

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[2] Claimant's Depo. (July 21, 2009) at 40.

[3] P.H. Trans., Resp. Ex. 2 at 4 (Mr. Raleigh's May 5, 2009 report at 2).

[4] *Id.*

[5] *Id.*, Resp. Ex. 2 at 2 (Dr. Koehler's July 10, 2009 letter).

[6] *Id.*, Cl. Ex. 7 at 3 (Murati's July 1, 2009 report).

The ALJ granted claimant's request for benefits, ordering respondent to provide claimant with a list of 3 physicians from which she was to select one to direct the care and treatment for her neck complaints. And although he did not specifically make a finding with respect to the date of accident, the ALJ's Order expressly finds that claimant provided timely notice of her claim, once she was told it was related to her work activities. The Order makes it clear the ALJ was not persuaded by respondents' witnesses who testified that claimant told them of her weekend activities with her grandchildren and the possibility that she was injured at that time, rather than while working.

Respondent appealed this Order asserting all the same arguments to the Board. After careful consideration of the parties' arguments and the evidence contained in the record, this Board Member finds the ALJ's Order should be reversed.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[7]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

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[7] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[8] K.S.A. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

Based upon this record, this Board Member finds that claimant has failed to meet her burden of establishing that her present neck complaints arose out of and in the course of her employment with respondent. While it appears to this member that the nature of claimant's job is, indeed, repetitive and required her to manipulate equipment, and take down information while monitoring testing equipment, the evidence (as presently developed) nonetheless does not establish that it is more likely than not that those work activities led to her present need for medical treatment.

Claimant worked her regular duties without incident up to April 3, 2009. She may have been stressed about the output requirements of her job, but she voiced no physical complaints to her coworker during their lunch that day. Only after she went home and played with her grandchildren did she begin to notice pain, swelling and, inexplicable, blotches or bruising on the skin of her left arm. Her complaints were so severe she sought medical treatment from the emergency room.

There is no medical explanation within this file for the contusions on claimant's arm. The ER records do not indicate there is a clear link between her work activities and her symptoms of pain and the skin discoloration. In fact, the bulk of her complaints relate solely to her left arm, not her neck. It is only on the second visit when she explains that her neck hurts when she turns her head. Again, work does not seem to be the cause of this, at least based on the ER records. What is clear is the fact that claimant's grandchildren were visiting that weekend and she walked behind them as they were skating. Although she vehemently denies injury, it is difficult to accept that her work activities caused the bruising *and* the pain and swelling. As claimant follows up with her personal physician, her complaints then begin to focus on her neck and eventually, by the end of April 2009 she is informed that her condition, and the need for further evaluation for surgery, is work-related. At no point does anyone explain how the bruising and contusions are connected to what is now a surgical situation.

Given these constellation of complaints and the claimant's admitted activities during that weekend, this Board Member is not persuaded that claimant's present need for treatment is causally connected to her work related activities. For this reason, the ALJ's Order is reversed. In light of this finding, the remaining issues in the appeal are moot.

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[10] *Id.*

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[11] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated September 21, 2009, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[11] K.S.A. 44-534a.